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## IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-1263-SB-2018 (O&amp;M)

Date of decision: 08.08.2023

Varinder Singh

...Appellant

VS

State of Punjab

...Respondent

**CORAM: HON'BLE MR. JUSTICE ARUN MONGA****Present:-** Mr. Harshit Jain, Advocate,  
For the appellant.

Mr. Mohit Thakur, AAG, Punjab.

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**ARUN MONGA, J.****CRM-11193-2018**

For the reasons stated in application, same is allowed and delay of 475 days in filing the appeal stands condoned, subject to all just exceptions.

**Main case**

Appeal herein is under Section 449 of The Code of Criminal Procedure (hereafter referred to as the Code) impugning an order dated 02.12.2016 (Annexure P-1) passed by learned Judge, Special Court, Sangrur whereby penalty of Rs.10,00,000/- under Section 446 of the Code was imposed on the appellant for failing to discharge his duty as a surety by not producing the principal accused-Hakam Ali in court, while he was on bail in a case under the NDPS Act. Pertinently, in the said case, Hakam Ali accused was later on acquitted by learned trial Court vide its order/judgment dated 09.02.2023.

2. Relevant facts first. An FIR No.84 dated 17.10.2014 under Section 22 of NDPS Act was registered against three accused namely Hakam Ali, Feroz Alam and Mohd. Azad. Varinder Singh, petitioner herein, stood surety for accused Hakam Ali for Rs. 10 lacs and gave the title papers of his house as a security, upon which the court recorded a note on the title document so that it can not be disposed of.

2.1 On 16.02.2015, the petitioner moved an application, Annexure P-3, before the court stating that the accused was then in custody in Sub Jail, Malerkotla and that he (the

petitioner) did not have trust upon the accused. Therefore, he requested the Court to cancel his surety and cancel the note given on the registry of his house. Application was taken up by the trial court on the same day i.e. 16.02.2015. On that date, personal appearance of accused Hakam was exempted and petitioner's application for discharge as surety was adjourned to 16.03.2015. The Petitioner was also directed to produce the accused on the next date of hearing. His application for discharge was thus kept pending. Same is borne out from a subsequent order dated 24.03.2015, appended herein as Annexure P-2 of which relevant part is as below :-

*“On 16.03.2015 notice was also issued to accused Hakam Ali and notice was also issued to his surety for today. However, despite of service both of them have not come present. On 16.02.2015 an application was filed by surety Varinder Singh for withdrawing the surety of accused Hakam Ali, but since on that day on the application, personal appearance of accused Hakam Ali was exempted and the matter was adjourned to 16.03.2015 and it was ordered that the application moved by Varinder Singh for withdrawing the surety will be heard on the date fixed. However, he was directed to produce the accused on date fixed. Today neither surety has come nor accused Hakam Ali has come present. In view of the same, bail bonds of accused Hakam Ali are also cancelled. He be summoned through non-bailable warrants of arrest. Since surety has also not come present. Let fresh notice under Section 446 Cr.P.C. be issued to the surety to show cause as to why the amount of the surety bonds be not recovered from him. To come up on 01.04.2015.”*

2.2 On 16.03.2015, neither the surety petitioner nor the accused were present in the court as is again evident from trial court order dated 24.03.2015 *supra*. Further, in the absence of the petitioner and his counsel on 24.03.2015, the court passed the aforesaid order, Annexure P-2, whereby bail bonds of accused Hakam Ali were cancelled. He was summoned through non-bailable warrants of arrest and a notice under section 446 of the Code was issued to the surety to show cause as to why the amount of surety bonds be not recovered from him.

2.3 Later, without passing any formal orders deciding the application seeking discharge *ibid*, either way, the Learned trial Court passed the impugned order dated 02.12.2016, which reads as under:

*“Surety Sukhjinder Kumar ad surety Varinder Singh have not produced the accused in spite of providing number of opportunities and time. Even they themselves have not come present to explain the reason or to seek further time. Finding no ground for awaiting their presence or to the a lenient view in the case for the absence of accused Hakam Ali, penalties of Rs. 10 lacs*

*each of the surety bond amount are imposed upon them. Recovery warrants be issued to the Collector of the District for 06.01.2017 to recover the penalty amount as arrears of land revenue from the movable and immovable properties.”*

Being aggrieved, the surety-Varinder Singh is before this court assailing the aforesaid order.

2.4. In fact, in the present proceedings, an order dated 10.02.2023 was earlier passed by a coordinate Bench of this Court, then seized of the matter, and the same being relevant, is reproduced below -

*“Learned State counsel, on instructions from ASI Sohan Lal submits that Hakam Ali-accused has been acquitted by the trial Court in terms of the judgment dated 09.02.2023. The appellant had furnished the bail bonds when Hakam Ali-accused was released on interim bail. On account of non-appearance of Hakam Ali-accused, the bail bonds were forfeited and penalty of Rs.10 lac was imposed upon the appellant.*

*Learned counsel for the appellant seeks adjournment to verify as to who had furnished the surety and details thereof when Hakam Ali-accused was arrested again.*

*Adjourned to 28.03.2023.”*

2.5. *Apropos*, on court query, learned State counsel does not controvert that the accused was furnished another surety subsequently and in any case he has been acquitted by the trial court.

3. Heard.

4. Learned counsel relies upon Section 444 Cr.P.C. and contends that in the peculiar situation as herein, the surety bond of the appellant was required to be discharged. His bond could not have been forfeited. Given that the accused himself has been acquitted, in any case no further surety is/was required and, therefore, impugned order is liable to be set aside.

5. Learned counsel also relies on judgment of the Apex Court passed in ***Mohammed Kunju vs. State of Karnataka***<sup>1</sup> in which it has been categorically stated that if there is no further role of surety, for non-appearance of the accused person against whom he has stood surety, or even otherwise, he has to be exonerated from his surety bond.

6. Before adverting to the merits of the appeal, since sections 444 and 446 of the Code are relevant herein, let us have a look at the same. These are reproduced below for ready reference :-

*“SECTION 444 :-*

*444. Discharge of sureties.*

- (1). All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.*
- (2). On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.*
- (3). On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.*

*SECTION 446 :-*

*446. Procedure when bond has been forfeited.*

- (1). Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.*

*Explanation :- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.*

- (2). If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code.*

*Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.*

- (3). The Court may, after recording its reasons for doing so, remit any portion of the penalty mentioned and enforce payment in part only.*
- (4). Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.*
- (5). Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.”*

7. A surety is an individual who provides a guarantee for the attendance and appearance of another person released on bail. The provisions contained in section 444 *ibid* seem to lay down the two-fold legal framework, i.e. firstly it is designed to ensure that individuals released on bail have to provide reliable and responsible sureties to ensure their attendance and appearance during legal proceedings. Secondly, at the same time, it also outlines the steps and consequences if sureties wish and apply to be discharged from their responsibilities.

7.1 Section 446 of Code outlines the procedure to be followed for forfeiting a surety bond, consequences of its forfeiture and the manner for imposition of penalty.

7.2 In my opinion, sub section (1) of the section 446 *ibid* consists of two steps. The first is the satisfaction of the Court by recording grounds/reasons that the bond has been forfeited. Thereafter, the second step is to call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. Sub section (3) provides that the Court may, after recording reasons for doing so, remit any portion of the penalty and enforce payment in part only. It shows that where a bond has been forfeited, the Court has also to decide whether to impose/enforce the full penalty provided for in the bond or to remit any portion of thereof and enforce payment in part only.

7.3 Provisions of section 446 thus show that, if it is proved to the satisfaction of the court that the bond has been forfeited, the court shall record the grounds for such proof for forfeiture; then call upon the surety to either pay the penalty specified in the bond or to show cause why the penalty should not be paid and if sufficient cause is not shown and the penalty is not paid, the court can take action to impose the penalty; the court has the discretion to remit (reduce) a portion of the penalty implying that forfeiture of the bond by itself does mean imposition of the whole of the penalty under the bond and that a specific order has to be passed fixing the amount of penalty and imposing the penalty. If the penalty thus imposed is not paid or cannot be recovered, the surety may be liable by order of the Court for imprisonment in civil jail for a period up to six months.

8. What we are concerned here with is the process for the discharge of surety; and also the procedure for forfeiting the bond, consequences arising from the forfeiture of a bond and for imposition of the penalty upon the surety.

9. In the light of the statutory provisions of sections 444 and 446 of the Code and, the observations recorded above, I am of the opinion that the following procedure and principles governing the discharge of a surety and when necessary, for forfeiting the bond and the further steps to be taken for imposing the penalty upon the surety need to be kept in mind by the courts :-

#### **A. DISCHARGE OF SURETY**

- A.1 . Surety can seek discharge at any stage : An individual who has stood surety for someone released on bail has the right to apply to the Court to be discharged from his responsibilities. He can seek a complete discharge from the bond.
- A.2. Warrant of Arrest for accused: Upon receiving the application from the surety, the Court will issue a warrant of arrest for the person concerned who was released on bail to be produced before the Court.
- A.3 . Appearance of the bailed Person: Once the person concerned is brought before the Court through the warrant of arrest or otherwise appears, the Court shall direct the surety bond to be discharged.
- A.4. Finding New Sureties: Once the Court orders the discharge of the bond for the surety, the person who was released on bail will be required to find other sufficient surety.
- A.5. Consequences of Failure: If the person who was released on bail fails to find other sufficient surety as required, the Court may commit him to jail.

#### **B. FOR FORFEITING THE SURETY BOND AND IMPOSING PENALTY**

- B.1 Forfeiture of bond and proof :- If a bond is executed for the appearance of an individual before a court or for the production of property and it is proven to the satisfaction of the court that the bond has been forfeited, the court must record the grounds for such proof. Similarly, if a bond is forfeited in any other context, the court must also record the grounds for forfeiture.
- B.2 . Notice and penalty :- The court may then call upon the person who is bound by the bond (surety) to either pay the penalty specified in the bond or to show cause why the penalty should not be paid. If sufficient cause is not shown and the penalty is not paid, the court can take action to impose the penalty.
- B.3 Discretionary Remission :- The court has the discretion to remit (reduce) a portion of the penalty and enforce payment only for the remaining amount, implying that forfeiture of the bond by itself does amount to imposition of the penalty and a specific order has to be passed for imposing penalty.

- B.4 Civil imprisonment in default of payment of penalty If the penalty imposed is not paid or cannot be recovered, the surety may be liable for imprisonment in a civil jail for a period up to six months.
- B.5. Surety's death :- If a surety to a bond dies before the bond is forfeited, his estate is relieved of any liability related to the bond.
- B.6. Use of Conviction as evidence :- If a person who has provided security under section 106 or section 11 or section 360 of the Code is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 448 of the Code (for a minor), a certified copy of the court's judgment can be used as evidence against the surety. The court will presume that the offense was committed by the same person unless evidence to the contrary is provided.

10. In the backdrop of the above legal position, adverting now to the case in hand, record shows that on 16.02.2015, the petitioner moved application Annexure P-3, before the court stating that the accused was then in custody in Sub Jail, Malerkotla and that he (the petitioner) did not have trust upon the accused and, therefore, requested the Court to cancel his surety and cancel the note given on the registry of his house. At that time, the accused was in custody in Sub Jail, Malerkotla and it was impossible for the petitioner to produce him in Court. In such situation, it was for the court to issue appropriate production warrant to the concerned official authorities to produce him accused.

10.1. On his production/appearance before the court, it was incumbent upon the court in terms of the mandate of section 444(3) of the Code to discharge the bond of the surety-petitioner and to call upon the accused to find other surety and, if he failed to do so, commit him to jail. Instead of that, the learned trial court passed the order dated 16.02.2015 directing the petitioner surety to produce the accused on date fixed (16.03.2015). This was patently wrong course of action adopted by the Court and does not stand legal scrutiny. The foundation of the impugned order dated 02.12.2016 is the direction given to the petitioner vide order dated 16.02.2015 to produce the accused in Court, when the latter was confined in jail. As the said direction was patently wrong and does not stand legal scrutiny, it follows that the same is also fatal to the impugned order dated 02.12.2016.

10.2. Impugned order imposing the hefty penalty of Rs. 10 lacs on the petitioner is punitive in nature. It does not show whether the required prior notice under section 446 of the Code was actually served on the petitioner and his explanation thereto was taken into consideration when it was passed. In such circumstances, the impugned order does not seem to show the compliance of the elementary rules of natural justice and fair play by the learned trial court.

10.3. In this case, Hakam Ali accused had also furnished his personal bond for release on bail. The court had accordingly passed the order Annexure P-2 whereby, *inter alia*, bail bonds of accused Hakam Ali were cancelled. Under section 446 of the Code, the accused had also incurred liability to pay the penalty of his personal bond. It appears that the learned trial Court just remained oblivious to this aspect of the case and did not proceed against the accused Hakam Ali for imposition and recovery of penalty from him. Thus, while the accused seems to have been just let off the hook for imposition and recovery of any penalty at all but his surety, the petitioner herein, has been slapped with maximum penalty of Rs. 10 lacs on the basis of his surety bond. As already observed, the petitioner had moved application Annexure P-3 on 16.02.2015 stating that the accused was then in custody in Sub Jail, Malerkotla and that he (the petitioner) did not have trust upon the accused and, therefore, had requested the Court to cancel his surety. At that time, the presence of the accused was required to be procured by the court itself and could have been easily done through a production warrant. This aspect of the case was totally ignored by the court while passing the impugned order. Looking at the case in its entirety, to my mind, the impugned order besides being not sustainable in law, is even otherwise patently inequitable, unfair and unjust and is extremely harsh and oppressive to the petitioner.

11. In the premise, impugned order cannot be sustained and same is hereby set aside. Appeal is allowed.

12. Pending application (s), if any, shall also stand disposed of.

13. A copy of this order be sent to the Registry for circulating it amongst the courts subordinate to this Court for guidance and directing that the procedure and

principles given in para 9 read with the relevant provisions of Section 444 and 446 of the Code governing the discharge of a surety and when necessary, for forfeiting the bond, consequences arising from the forfeiture of a bond and for imposing penalty upon the surety be kept in mind.

( ARUN MONGA )  
JUDGE

08.08.2023

Vandana

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No